

## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16000 POST AUDIT ACTIVITY**

GTAM 16100	POST-CORRESPONDENCE
GTAM 16200	PROTESTS
GTAM 16300	CLAIMS
GTAM 16400	GUIDELINES FOR PREVIOUSLY AUDITED TAX YEARS

Reviewed: April 2003

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16100 POST-CORRESPONDENCE

You must consider correspondence from a taxpayer or representative after a notice is issued or a case is closed. When you receive correspondence, review it to decide what course of action to take:

- Is it a protest letter? See GTAM 16200, *Protests*.
- Is it an untimely protest? See GTAM 16210, *Valid Protest*.
- Is it a claim? See GTAM 16300, *Claims*.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16200 PROTESTS

GTAM 16210	Valid Protest
GTAM 16211	Logging Protests
GTAM 16212	Suspended Corporations
GTAM 16220	Paid Protests
GTAM 16230	Taxpayers' Bill of Rights - Action on Protests
GTAM 16240	Notice of Action on Protests
GTAM 16241	Notice of Action - Jeopardy Assessment
GTAM 16250	Notice of Revision
GTAM 16260	Innocent Spouse
GTAM 16261	Non-Liable Spouse - Innocent Spouse Transaction
GTAM 16270	Protest Appeals to the Board of Equalization
GTAM 16280	Suit for Refund - Superior Court
GTAM 16290	Conversion of an Assessment into an Overassessment

A protest gives the taxpayer the opportunity to disagree with a proposed deficiency assessment.

Protests are categorized as either *docketed* or *undocketed*. Protests classified as docketed have more significant legal issues and require the Legal department's advice. The Protest Unit can resolve undocketed protests. Most protests are undocketed.

Reviewed: April 2003

## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual

General Tax Audit Manual

---

### 16210 Valid Protest

According to CR&TC section 19041, the taxpayer may file a *written* protest with us against the proposed deficiency assessment within 60 days of the date of each notice of proposed deficiency assessment, specifying in the protest the grounds upon which it is based. The Notice of Proposed Assessment tells how to file a protest. We include the *NPA Information* –(Form FTB 7275) with the Notice of Proposed Assessment. This form explains the protest procedures and tells the taxpayer about our Taxpayer Advocate (see GTAM 9900, *Taxpayer Advocate, Public Affairs, & Legislative Services Referrals*, for more Taxpayer Advocate Information).

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16211 Logging Protests**

A Protest Unit manager, supervisor, or designee reviews all cases to decide if the protest unit will handle it, return it to the originating unit for further work, or refer it to the Legal department.

When the Protest Unit gets the protest, it sends a copy of the original protest letter to the auditor who conducted the examination. This allows you to respond to issues in the letter, and to provide any information that may help the hearing officer resolving the case.

Cases that are not fully developed because notices were issued due to a failure to furnish information or an impending statute of limitations may be returned to the original unit for further development or analysis. If this occurs, Hearing Officers are available to discuss the case. Upon completion, you should return the case to the Protest Unit with a cover memo and the revised analysis/narrative report for final determination and processing.

In addition, the protest unit will contact you to discuss final protest determinations that involve:

- A material revision/withdrawal,
- A revision/withdrawal that involves audit practice considerations, regardless of the amount,
- Revisions/withdrawals that involve significant gray issues, or
- Revisions/withdrawals on cases where you have requested notification of the final determination.

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16212 Suspended Corporations**

A suspended corporation has no privileges or rights. Consequently, it cannot file a protest while it is suspended. The taxpayer must revive to good standing within the protest period to have a timely protest (California Revenue & Taxation Code section 23301). A suspended corporation is one, which has had its corporate rights, privileges, and powers suspended by the FTB or the Office of the Secretary of State (SOS). A corporation may be suspended for failing to file tax returns, pay taxes, pay assessments, or file the necessary documents with the SOS.

To verify a corporation's status, check BETS.

Occasionally a suspended corporation may have an overpayment on one tax year and a balance due on another year. In these situations we may apply the overpayment to the balance due in order to facilitate a revival of the corporation. These are generally handled by the Collection Bureau. On a case-by-case basis, the Collection Bureau may refer questions to the GTA Collection Liaison for an informal review of the issue. If the liaison can easily determine based on the information available, that an overpayment does exist, the collection representative may credit the overpayment against a balance due in accordance with CR&TC section 23305.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16220 Paid Protests

CR&TC section 19335 says that payment of the tax protested, made with or after the filing of a protest, constitutes a claim for refund (see GTAM 16300, *Claims*, for more information). We do not treat an unidentified payment posted as a miscellaneous payment as a claim for refund unless the taxpayer intended that payment be made under protest. To be treated as a claim for refund, the taxpayer must properly identify the payment's purpose. If a miscellaneous payment is subsequently identified as a deficiency payment made under protest, we treat it as a claim for refund if it otherwise meets the requirements.

To protect the taxpayer's protest rights, we record these cases as formal claims but treat them like any other protest and do not finalize them until we have made the determination and issued a Notice of Action.

If you are working a Protest case and the taxpayer pays the assessments, you should treat this case unit as a *Claim* type case on PASS. Change the case unit type to "*Claim*" type and complete all information on the Claim General Information tab including the *Paid Protest Date* field.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16230 Taxpayers' Bill of Rights - Action on Protests

Pursuant to the Taxpayers' Bill of Rights (CR&TC section 21010), we have established a 33-month or shorter period in which we evaluate the merits of a protest and any included claims for refund, conduct a hearing if requested, and issue a notice of action.

This period begins on the date the taxpayer files a protest to the Assessment, and expires when the Notice of Action is issued. See FTB Notice 99-1 for more information.

The Taxpayers' Bill of Rights (CR&TC section 21011) also provides for hearings before our audit staff or legal staff. Hearing procedures require that:

- We hold hearings at a reasonable time, at a Franchise Tax Board office that is convenient to the taxpayer, when possible.
- We may only record hearings if we give prior notice to the taxpayer. The taxpayer is entitled to a copy of the recording.
- We inform taxpayers before any hearing that they have the right to be represented by their designated agent at the hearing.

We must act on every protest. Even if a taxpayer pays the tax or penalty in full when filing a protest, or at any time before we take final action, the taxpayer is entitled to full protest rights. We act upon all protests by issuing a Notice of Action. For more information, see GTAM 16240, *Notice of Action on Protests*, and GTAM 16250, *Notice of Revision*.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual

General Tax Audit Manual

---

### 16240 Notice of Action on Protests

We must act on all protests by affirming, revising, or withdrawing the Notice of Proposed Assessment. Before any action, the hearing officer must send a letter to the taxpayer explaining why we are taking the action. If we get no more information, we then send a formal notice to the taxpayer by issuing a Notice of Action. A Notice of Action affirms, revises, or withdraws the Notice of Proposed Assessment.

We issue a Notice of Action on every Notice of Proposed Assessment that *the taxpayer has formally protested*. A Notice of Action may never increase the amount of tax or penalty on the Notice of Proposed Assessment.

If the taxpayer disagrees with the protest determination, the taxpayer may appeal to the State Board of Equalization or pay the deficiency and file a claim for refund. See GTAM 16270, *Protest Appeals to the Board of Equalization* and GTAM 16300, *Claims*, for more information.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16241 Notice of Action - Jeopardy Assessment

We issue a *Notice of Action*, (Form FTB 5933 or Form FTB 5934) on protested jeopardy assessments. We use Form FTB 5933 for corporations in good standing and for Personal Income Tax taxpayers, when we revise, affirm, or withdraw the jeopardy. We use Form FTB 5934 for suspended corporations.

If taxpayers disagree with the action, they may file an appeal with the Board of Equalization within 30 days of the date of the Notice of Action. However, if the taxpayer is a suspended corporation, the corporation must first regain good standing to file an appeal. See GTAM 13240.3, *Jeopardy Assessments*, for more information.

Reviewed: April 2003

## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16250 Notice of Revision

We often get responses to a Notice of Proposed Assessment that *do not* qualify as protests. This response may agree to an assessment, explain an error in a calculation, or state that the taxpayer is unable to pay.

We handle a response that raises an objection to a Notice of Proposed Assessment adjustment but which *does not* constitute a protest by issuing a Notice of Revision. A Notice of Revision differs from a Notice of Action-Revision. A Notice of Action-Revision is issued to revise a Notice of Proposed Assessment that was timely protested.

We must answer the letter even if no adjustment to the Notice of Proposed Assessment is warranted. The reply should restate audit's position and explain the Notice of Proposed Assessment will become final 60 days from the date of issuance unless a protest is filed within that time.

If a revision is needed, it finalizes at the expiration of the original 60-day period. However, the notice remains subject to protest within that period.

Reviewed: April 2003

## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16260 Innocent Spouse

Under certain circumstances, an innocent spouse can seek relief from a joint tax liability.

1. CR&TC section 18533 (formerly 18402.9) - Relief from additional tax.
2. CR&TC section 19006(b) (formerly 18555(b)) - Relief by court order, and tax clearance revision certificate.
3. CR&TC section 19006(c) (formerly 18555(c)) - Relief from return tax.

In general, audit will only deal with number one above. There are three subsections of CR&TC section 18533:

- 18533(b) - Innocent Spouse Relief.
- 18533(c) - Separation of Liability
- 18533(f) – Equitable Relief.

The specific requirements for each subsection vary.

Relief under the last one is for tax on a return or an amended return, and is generally claimed during the collection process.

Relief is allowed if the taxpayer could otherwise timely protest, appeal, file a refund claim, or file suit.

In general, California Revenue and Taxation Code section 18533 authorizes us to relieve a spouse from an additional tax assessment when the following requirements are met:

1. A joint return was filed for the year for which relief is requested.
2. The incorrect tax deductions or the unreported income is because of the actions of the other or former spouse.
3. The taxpayer requesting relief had no knowledge or reason to know about the incorrect tax deductions or unreported income.
4. The taxpayer requesting relief did not earn, manage, or control the unreported income, and was not responsible for the incorrect tax deductions.
5. The taxpayer requesting the relief did not receive a significant benefit from the incorrect tax deductions or unreported income.
6. Statute must be open under a statute code section for the year relief is sought.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

We must notify the other spouse (or non-electing spouse) that the spouse has requested relief of liability. We must give them the opportunity to participate in the determination.

If a spouse substantiates innocent spouse, then that spouse is relieved of liability for that portion of the tax. The joint Assessment must be affirmed, a Non-Liable Spouse (full) transaction must be completed, and a letter sent to the innocent spouse confirming the relief (see GTAM 16261, *Non-Liable Spouse - Innocent Spouse Transaction*).

It is possible for the electing spouse to be partially non-liable. Affirm the joint assessment, complete a Non-Liable Spouse (part) transaction, and send a letter and allocation schedule to the innocent spouse confirming the portion which they are still liable for.

**NOTE:** If the innocent spouse issue emerges after the Assessment has gone final, refer the case to the Collection Bureau Innocent Spouse Unit, Mail Stop H-080.

If relief of liability is denied, affirm the joint assessment. Include reasons for the denial in the assessment.

Reviewed: April 2003

## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16261 Non-Liable Spouse - Innocent Spouse Transaction

For the fully or partially non-liable spouse, follow these procedures:



- Issue a *Notice of Action - Affirmation* (see GTAM 16240, *Notice of Action (NOA) on Protests*, for additional information). If there are other issues to adjust, issue a *Notice of Action – Revision*. If innocent spouse is the only issue, send a letter to the innocent spouse. The letter should state that innocent spouse relief is granted (in full or partially) under California Revenue and Taxation Code section 18533 (and the applicable subsection) and that we will send an NOA-Affirmation/Revision (whichever is applicable). The letter should also explain that the innocent spouse will receive the first billing notice.
- Complete a *Technical Support Request* - Form FTB 7053 requesting an account status change on TI (Non-Liable Spouse – (Full/Part) Transaction) for the applicable spouse. Attach the *Technical Support Request* to the face of the return, and route the file to Audit Business Support.
- Mail a copy of the revised or affirmed Notice of Proposed Assessment to each spouse.
- Be sure to include a comment on the Taxpayer Information system indicating the relief. Give the tax year and code section under which relief was allowed. If partial relief is granted, state the amount of the tax, penalty and interest owed by the electing spouse.

---

Reviewed: April 2003

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual

General Tax Audit Manual

---

### 16270 Protest Appeals to the Board of Equalization

The taxpayer has 30 days after the mailing date of the Notice of Action to appeal our action upon protest to the State Board of Equalization. The appeal must be in writing. (CR&TC section 19045) If no appeal is filed within the 30-day period, the assessment becomes final and the deficiency assessed is due and payable within 10 days (for taxable years through December 31, 1997), or within 15 days (for taxable years beginning on or after January 1, 1998), from the date of the notice and demand (CR&TC section 19049). If full payment is received within the 10 or 15 days, interest is waived for that 10 or 15 day period.

If an appeal is filed, both the taxpayer and we have the chance to provide more information.

Once the Board of Equalization has evaluated the facts and rendered a decision, the law allows for a rehearing if requested by either party within 30 days of the decision. If no rehearing petition is filed, the Board's decision becomes final 30 days after it is rendered. If a rehearing petition is filed, the Board's decision on the petition becomes final 30 days from the time the Board issues its opinion on the petition. (CR&TC section 19048).

Once the Board of Equalization renders a decision, it is final and binding on us, but not on the taxpayer. However, we can petition for a rehearing.

See GTAM 16360, *Denial of Claim*, for information about appeals from the denial of a claim for refund.

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual

General Tax Audit Manual

---

### **16280 Suit for Refund - Superior Court**

Taxpayers can appeal to the State Board of Equalization or sue directly in Superior Court after a claim or appeal of a protest is denied. However, with the exception for an issue of residency, before they can file suit in California Superior Court, they must pay the tax, penalty, and interest. They can act to recover payment in Superior Court within 90 days after:

- The date the Board of Equalization mails the final notice of action, or
- The date we mail our notice of action on the claim for refund.

Either the taxpayer or we can appeal a Superior Court decision to the California Appellate Court or the California Supreme Court, and ultimately to the U.S. Supreme Court.

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16290 Conversion of an Assessment into an Overassessment**

Where both positive adjustments increasing income and negative adjustments decreasing income result in a Notice of Proposed Assessment, and the Notice is subsequently withdrawn and the negative adjustments sustained, resulting in an overpayment of tax, we treat the Assessment as an Overassessment.

We must issue a Notice of Proposed Assessment before the statute of limitations expires for issuing an Overassessment (as defined in CR&TC section 19306). If we issue an Assessment after the statute of limitations expires for issuing an Overassessment, the negative adjustments noted on the Notice of Proposed Assessment can only offset the deficiency related to the positive adjustments.

We cannot introduce new issues into the computation of the overpayment that increase the overpayment, unless the statute of limitations is open for filing a claim for refund or issuing an additional Notice of Proposed Overassessment. In addition, negative income adjustments raised by the taxpayer during audit but not in the income adjustments resulting in the Assessment, if subsequently allowed, may not increase the overpayment unless a timely claim for refund was filed for those issues.

An overpayment from a Notice of Proposed Overassessment may be increased only in the same circumstances that allow the increase in an overpayment arising from a claim for refund. That is, the amount of the additional overpayment identified after the statute of limitations for filing a claim or issuing an Overassessment expires must be directly related to the respective issues resulting in the Overassessment.

The statute of limitations applies separately for each taxpayer in a combined report. That is, for the time that deficiency and claim for refund or Notice of Proposed Overassessment statutes differ, an Assessment subsequently treated as an Overassessment may not offset other combined report member's tax liability if the statute of limitations expired for issuing an Overassessment when we issued the Assessment.

Taxpayers do not have appeal rights to our final action on an Overassessment that was started by the department, not by a claim for refund.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16300 CLAIMS

GTAM 16310	Valid Claim
GTAM 16311	Conversion Of Assessment To A Claim For Refund
GTAM 16320	Corporation Claim for Refund
GTAM 16321	Closing Forms - Corp. Claims
GTAM 16330	Personal Income Tax (PIT) Claim for Refund
GTAM 16331	Closing Forms - PIT Claims
GTAM 16340	Multiple Issue Claims
GTAM 16341	Accounting Instructions/Corp. - Form FTB 6213A
GTAM 16350	Special Claim Instructions
GTAM 16351	Case Type: Claim v. Audit
GTAM 16360	Denial of Claim
GTAM 16370	Protective Claims

A claim for refund lets taxpayers request a credit against a current or prior year tax liability. PIT and Corporation claims may be referred to audit for review. The GTA Central Office Audit section will decide to process claims by correspondence or in the field. Once a claim is refunded, it is a "paid amended return".

CR&TC section 19331 provides that if a claim for refund is not resolved within six months after the **claim** is filed with us, the taxpayer may deem the claim denied and file an appeal with the California State Board of Equalization.

Treat claims as a priority and designate them so on PASS.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16310 Valid Claim

Effective January 1, 2000, in general, no credit or refund is allowed after the later of:

- The period ending four years from the date the return was filed, if filed within the extension time prescribed by Section 18567 or 18604,
- Four years from the last day prescribed for filing the return, without regard to filing extensions, or
- One year from the date of the overpayment, unless the taxpayer files a claim before that period expires, or unless we allow a credit or mail a notice of proposed overpayment on a preprinted form that we prescribe before the period expires.

See CR&TC section 19306 for more information.

A valid claim must:

- Be written
- State the reason for the claim
- Be signed by the taxpayers or their authorized representative
- Tax must be paid in full (CR&TC section 19322).

Interest does not have to be paid. Any claim not meeting this criterion is an *"invalid claim."* **NOTE:** If a taxpayer is making installment payments on a tax liability and filing a claim for refund with each installment, the claims are not considered valid because the underlying tax is not paid in full. See FTB Notice 97-4, and FTB Notice 97-8.

If a claim is invalid, we send a letter to the taxpayer explaining why. This is not a Denial Letter. The taxpayer has no appeal rights. Invalid claims due to lack of full payment or other deficiencies based upon CR&TC section 19322 are *rejected without appeal rights*.

**NOTE:** Otherwise valid claims that are *untimely* are *denied with appeal rights*, so that the taxpayer can argue the Statute issue.

This [flowchart](#) can help you determine if you have a valid claim.

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16311 Conversion Of Assessment To A Claim For Refund**

If a taxpayer pays additional Assessment tax and penalty, if any, the protest or appeal converts to a claim for refund under CR&TC section 19335. However, we treat the Notice of Proposed Assessment as a protest and the additional tax does not finalize until action on the claim for refund is final.

If the additional Assessment is cancelled when we take final action on the claim for refund, and the negative adjustments on the Assessment result in an overpayment, we treat the notice as if the Notice of Proposed Assessment had not turned into a claim for refund.

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# **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

## **16320 Corporation Claim for Refund**

GTAM 16321      Closing Forms – Corp. Claims

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16321 Closing Forms - Corp. Claims

#### [Closing Claim Procedures for Corporations](#)

The AUDITOR'S RECOMMENDATION FORMAL CLAIMS – Use Form FTB 6638 when a corporation claim for refund is either allowed or denied in full. The instructions below apply to the AUDITOR'S RECOMMENDATION FORMAL CLAIMS - Form FTB 6638:

##### Form FTB 6638 Instructions

1. **Taxpayer** - Name of the corporation
2. **Taxpayer ID** - The corporate number assigned by the state
3. **Income Year(s)** - Enter the years
4. **Cc(s)** - Indicate the name and address where copies should be sent.
5. **Reviewer** – The reviewer's initials
6. **Created By** – Name of the maker
7. **Last Modified Date** – Date created or last changed
8. **Review Date** – Reviewer enters the review date
9. **Deny Claim For Refund For.** - Check the box if denied in full. Explain the denial in the "Explanation" section. Show the taxable years ending (MM/YYYY), claim number if applicable, and the dollar amount of the denial.
10. **Allow Claim For Refund For.** - Check the box if allowed in full. For each year allowed in full, list the taxable years (MM/YYYY), claim number if applicable, dollar amount, revenue code, and check the "Notice Related" or "Notice Unrelated" box if applicable.
11. **Explanation** –
  - **Denied with no other action** - Explanation paragraph 60001 will automatically be typed. Be sure to include any other explanations such as reference to any Informal Denial Letters that may have been previously sent to the taxpayers. An Informal Denial Letter is like a position letter. See GTAM 9500, *Position Letter/Audit Issue Presentation (Explanation of Adjustments)*, for more information.
  - **Denial with NPA on same year** - Enter paragraph number 50625.
  - **Denial with NPA on same issue in a different year** - Enter paragraph number 50621 with an explanation, and a note stating, "Do not type until related NPA on taxable year MM/YYYY goes final." Refer to any Informal Denial Letters that may have been previously sent to the taxpayers. An Informal Denial Letter is like a position letter. See GTAM 9500, *Position Letter/Audit Issue Presentation (Explanation of Adjustments)*, for more information.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual

General Tax Audit Manual

---

- **Allowed in full** - Explanation paragraphs 60014 and 60015 will automatically be typed. If another paragraph is desired, write it in this area.
  - **Claim allowed in full, and an NPA is greater than the claim** - Check the deny claim box and enter paragraph 50625. Complete FTB 6830-BCT (NPA Worksheet).
12. **N/C PAR 53400 (23X)** – Check the box if applicable and enter the taxable years.

**NOTE:** Print a hard copy of the *AUDITOR'S RECOMMENDATION FORMAL CLAIMS* - Form FTB 6638 and attach to the face of the tax return for processing. Write/stamp the word, "PASS" in purple, on the upper right corner of the form.

**NOTE:** The allowance or denial of a claim in full refers to the *amount* of the claim, *not* the issue. So if the claim issue is allowed, but another issue is adjusted, resulting in no refund due or the issuance of a Notice of Proposed Assessment, the claim is considered denied in full.

If the claim is denied in full and additional tax is due, complete the *AUDITOR'S RECOMMENDATION FORMAL CLAIMS* - Form FTB 6638 with the, "Deny Claim For Refund For" box checked. Include the dollar amount, year, and claim number, if applicable. In addition, complete the *BETS NPA Worksheet* - Form FTB 6830-BCT. We hold Form FTB 6638 until the Notice has gone final. This prevents the taxpayer from protesting the Notice and having to file an appeal on the denied claim.

If a claim is increased or decreased, use the *BETS NPA Worksheet*. The previously assessed and corresponding starting income should be from the latest return filed (per BETS). Use the right Notice of Proposed Assessment paragraph to explain the increase or decrease.

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16330 Personal Income Tax (PIT) Claim for Refund**

See GTAM 16331 Closing Forms - PIT Claims

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# **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

## **16331 Closing Forms - PIT Claims**

[Closing Claim Procedures for Individuals](#)

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**The information provided in the Franchise Tax Board's internal procedure manuals does not reflect changes in law, regulations, notices, decisions, or administrative procedures that may have been adopted since the manual was last updated**

## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16340 Multiple Issue Claims

Often, a claim for refund involves multiple issues and both positive and negative changes. If audit proposes to change the claim, it is important to issue the correct notice.

For example, a taxpayer files a claim for refund, based upon multiple issues that are both positive and negative. Issue #1 is based upon a Revenue Agent Report adjustment. The additional tax resulting from the Report issue is \$100. Issue #2 is a California only adjustment. The tax effect of the California only adjustment is \$<200>. The net tax effect is a claim for refund of \$<100>.

If the Report issue is allowed and the California only adjustment is denied, we issue a Notice of Tax Due for the Report issue instead of a Notice of Proposed Assessment. We would issue an Assessment if we got the Report from the taxpayer *without* an amended return. The Notice of Tax Due gives the taxpayer *no* appeal rights, since filing the amended return makes the Report issue a *self-assessed* tax.

We also issue a Claim Denial Letter for the California only adjustment. The Claim Denial Letter (with the *Appeal Procedures* - Form FTB 1084) gives the taxpayer appeal rights.

For corporate taxpayers, we issue the Notice of Tax Due by preparing the *Accounting Instructions/Corp.* - Form FTB 6213A (see GTAM 16341, *Accounting Instructions/Corp.* – Form FTB 6213A).

For individual taxpayers, we issue the Notice of Tax Due by preparing the *Technical Support Request* - Form FTB 7053.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### **16341 Accounting Instructions/Corp. - Form FTB 6213A**

Use the *Accounting Instructions/Corp. - Form FTB 6213A* to create a Notice of Tax Due. This notice gives the taxpayer *no* appeal rights. For an example, see GTAM 16340, *Multiple Issue Claims*.

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# **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

## **16350 SPECIAL CLAIM INSTRUCTIONS**

GTAM 16351	Case Type: Claim v. Audit
GTAM 16360	Denial of Claim
GTAM 16370	Protective Claim

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16351 Case Type: Claim v. Audit

Scenario #1 - An audit begins in tax year 1995, and two months later the taxpayer files a claim for refund for 1995. Change the case type to "*Claim*" and make the claim the primary case unit.

Scenario #2 – We get a claim for tax years 1992 and 1993. We create case units manually for these claims. The case type is "*Claim*." We later open tax years 1994 and 1995 for the same issue, and create the case units manually. The case type for these two years is "*Audit*." The primary case unit is the latest year claim. The workload codes for each case unit correspond to their respective case types. Because you have four case units with two different workload codes, charge all claim time to the primary case unit (the latest year claim). Charge all audit time to the latest year's audit case unit (1995).

Reviewed: April 2003

## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual

General Tax Audit Manual

---

### **16360 Denial of Claim**

If we deny or partially deny a claim for refund, the taxpayer has 90 days after we mail the notice of denial to file an appeal in writing with the Board of Equalization or bring action in California Superior Court.

In addition, if we fail to act on the claim within six months, the taxpayer can deem the claim denied, and file an appeal with the Board of Equalization or bring action in California Superior Court as if we formally denied the claim.

Once the Board of Equalization renders a decision, it is final and binding on us, but not on the taxpayer.

Either the taxpayer or we can appeal a Superior Court decision to the California Appellate Court or the California Supreme Court, and ultimately to the U.S. Supreme Court.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16370 Protective Claims

When the IRS or another state is auditing a taxpayer or an entity that the taxpayer has invested in, tax years may sometimes be overpaid. In these cases, it is common for a taxpayer to file a "*Protective Claim*." The protective claim may state it is for "\$1.00 or more", and generally contain language that asks us to withhold action on their claim until they have settled the IRS audit, the other state, or agency with whom litigation is pending. Claims involving pending federal determinations stay with the *RAR Unit - Pending Federal*. We refer all other protective claims to GTA Central Office. Some protective claims are Other State Tax Credit issues where the taxpayer is awaiting resolution of a refund, etc. from another state agency.



- Refer non-Revenue Agent Report protective claims to GTA Central Office.
- We examine the protective claim to determine if it is valid (pending resolution of adjustments to income by an other state taxing agency). See GTAM 16310, *Valid Claim*, for more information.
- Route valid protective claims to the Audit Business Support Section for holding.
- Audit Business Support sends taxpayers a letter informing them that action on the claim is pending the other state's resolution.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16400 GUIDELINES FOR PREVIOUSLY AUDITED TAX YEARS

GTAM 16410	Exceptions to the general rules - Previously audited tax years
GTAM 16420	Audit Defined
GTAM 16421	Non – Audit Contacts

In general, you should not reopen audited years. However, there are exceptions, such as a material change in fact.

We have the statutory authority to examine any books, papers, or other data to confirm the accuracy of any return. There is no statutory limit to the number of audits per return. However, we should not subject taxpayers to unnecessary audits. Therefore, reopen audited years only in the following limited circumstances:

- Misrepresentation of a Material Fact - There is misrepresentation of a material fact, evidence of fraud, malfeasance, collusion, or concealment. This does not include development of a new audit perspective. Discoveries of information or issues missed by the prior audit are not misrepresentations of facts unless it can be demonstrated that the taxpayer deliberately withheld requested information.
- A Clearly Defined Substantial Error Based on an Established FTB Position - The prior closing involved a clearly defined substantial error based on an established Franchise Tax Board position at the time of the previous audit. An error is *clearly defined* if it is readily apparent.

*Substantial* refers to the dollar amount of tax that would not be assessed if we did not reopen the case. "Substantial" is determined on a case-by-case basis, considering all facts and circumstances relating to materiality. Generally, an error may be substantial if the dollar amount of the tax not assessed exceeds the greater of \$10,000 or 5% of the tax assessed (IRM Section 4023.5) on the original return or determined during the previous audit. Use your judgment before relying upon the dollar amount.

An *established Franchise Tax Board position* is one that is clear (not in the developmental stage) at the time of the previous audit. Examples of an *established Franchise Tax Board position* are an Audit Branch Procedure Statement, a position published in an Audit Program Report, a position

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## CALIFORNIA FRANCHISE TAX BOARD

### Internal Procedures Manual General Tax Audit Manual

---

taken in a Franchise Tax Board Notice, or a finding in a Legal Ruling (presuming they were not superseded).

- A Serious Administrative Omission - A serious administrative omission occurs when failure to reopen a closed audit could (1) Result in serious criticism of our tax law administration; (2) Establish a precedent that seriously hampers future attempts to take corrective action; or (3) Result in inconsistent treatment of similarly situated taxpayers.

Reviewed: April 2003

## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### **16410 Exceptions to the general rules - Previously audited tax years**

Exceptions to the general rules for previously audited tax years, as discussed above (see GTAM 16400, *Guidelines for Previously Audited Tax Years*) include the following situations:

#### Pass-Through Entity Audits

Pass-through entities and their partners/shareholders/members are distinct taxpayers. Therefore, we issue their audit determinations separately. A determination issued to a pass-through entity because of an entity level examination is not the same as an audit of the owners and vice-versa.

A flow through adjustment from a pass-through entity level examination is not an audit of the investors' returns on other issues. To the extent investor level issues, such as basis determination, are included in the entity examination, an audit was conducted on the investor's return, and the investor's return is subject to the same reopening criteria as other audits.

An audit of the books and records of a pass-through entity of which a taxpayer is an owner does not constitute reopening the audit of the owner's return, even though the owner's return was previously examined for other issues.

#### Carryover Years

We may audit a credit carryover, net operating loss carryover, or similar carryover in the year the carryover is used even though the year in which the credit or loss originated is not within an open statute of limitations. To the extent the carryover is incorrectly reported, we should not allow it to reduce tax in the current audit year or future years.

#### Closing Agreements

If we have reached an agreement with the taxpayer about the treatment of certain items, we should adhere to this agreement for all tax years specifically stated in the closing agreement unless there is a material difference in facts or there a change in the relevant statute, regulations, or case law.

#### Surveys

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual

General Tax Audit Manual

---

When a return is classified as a survey, it indicates that the return was not selected for audit. An audit after a survey does not constitute reopening of an audited year.

### **Post Notice of Proposed Assessment Development**

After we issue a proposed assessment or an over-assessment, the audit may be resolved with further factual development or law application. This may involve a hearing officer or settlement or appeal attorney. Gathering facts related to the assessment does not constitute reopening the audit of the return.

Reviewed: April 2003

## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual  
General Tax Audit Manual

---

### **16420 Audit Defined**

In general, any inspection of relevant books, papers, or other data to confirm the accuracy of any return is an audit. An audit is considered closed when we notify the taxpayer in writing of the final determination after review, after the taxpayer has exhausted all administrative remedies, including protest, claim, appeal, and settlement.

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## CALIFORNIA FRANCHISE TAX BOARD

Internal Procedures Manual  
General Tax Audit Manual

---

### 16421 Non – Audit Contacts

We may contact taxpayers because of the return processing, verification, and correction program. For purposes of these procedures, the following are examples of contacts that are *not* considered audits:

#### Math Errors

A contact with a taxpayer to correct mathematical or clerical errors is not considered an audit..

#### Return Information Notice

A contact with a taxpayer to determine the correct tax and applicable payments, or any other adjustment of an unallowable item, for which we issue a Notice, is not an audit. Examples of existing programs are:

- Verifying claimed withholding;
- Verifying/reconciling/correcting estimate payments;
- Recomputing tax liability using correct rates or tables;
- Adjusting for penalties payable upon notice or demand; and
- Looking for refund fraud.

#### Non-filers

Contacting taxpayers asking them to file a return where none has been filed is not an audit. If, when the return is filed, we examine books and records to verify the correctness of that return, we have performed an audit.

#### Information that Must Be Filed

Contacting a taxpayer, including information return filers such as partnerships, S corporations, limited liability companies, and fiduciaries, to request information that must normally be filed or included with the return is not an audit.

#### Preliminary Information Requests

Contacting a taxpayer to get preliminary information to perform test checks while scoping is not an audit *if* we tell the taxpayer clearly that we want the information to determine whether or not to pursue an audit.

#### Revenue Agent Reports

A contact verifying the correctness of a final federal determination or applying final federal determinations is not an audit. This includes:

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## **CALIFORNIA FRANCHISE TAX BOARD**

Internal Procedures Manual

General Tax Audit Manual

---

- The Automated Underreporter program (CP 2000);
- Resolution of voluntary Revenue Agent Reports; and
- Application of non-voluntary Revenue Agent Reports from the IRS.

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